

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Disposition of Down Payments and Pending	)	
Applications for Licenses Won During Auction No. 35	)	
for Spectrum Formerly Licensed to NextWave	)	WT Docket No. 02-276
Personal Communications Inc., NextWave Power	)	
Partners, Inc. and Urban Comm-North Carolina, Inc.	)	

Auction Event No. 35

**REPLY COMMENTS**

T-Mobile USA, Inc. (“T-Mobile”)<sup>1</sup> submits these reply comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) September 12, 2002, public notice seeking comment on the disposition of down payments and pending applications for certain licenses won in Auction No. 35 (the “Licenses”).<sup>2</sup>

Commenters unanimously agree that the continued deterioration of the telecommunications sector over the past six months coupled with the \$16 billion in contingent liability associated with the Licenses have significantly constrained the applicants for these Licenses (the “Applicants”) from investing in their existing networks and services and deploying new technologies and services. Against this backdrop, every

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<sup>1</sup> T-Mobile USA, Inc. (formerly known as VoiceStream Wireless Corporation), combined with Powertel, Inc., is the sixth largest national wireless provider in the U.S. with licenses covering approximately 94 percent of the U.S. population and currently serving over eight million customers. T-Mobile and Powertel, Inc. are wholly-owned subsidiaries of Deutsche Telekom, AG and are part of its T-Mobile wireless division. Both T-Mobile and Powertel are, however, operated together and are referred to in this comment as “T-Mobile.” All comments filed on October 11, 2002, will hereinafter be short cited.

<sup>2</sup> FCC Public Notice, *Commission Seeks Comment On Disposition Of Down Payments And Pending Applications For Licenses Won During Auction No. 35 For Spectrum Formerly Licensed To NextWave Personal Communications Inc., NextWave Power Partners, Inc. And Urban Comm -- North Carolina, Inc.*, FCC 02-248 (rel. Sept. 12, 2002).

commenter supports, through one approach or another, the voluntary withdrawal of the Applicants' pending Auction No. 35 applications. Commenters also demonstrate that no justification exists for applying penalties to withdrawing Applicants.

Although the commenters present various mechanisms for implementing an opt out plan for the Applicants, any opt out plan adopted by the Commission must be administratively simple, easy to implement and rapidly concluded. Further, the Commission must reject the Eldorado Communications, LLC ("Eldorado") proposal to condition relief accorded the Applicants upon equal treatment for Auction No. 5 bidders. This proposal is distinguishable from the instant proceeding and should be rejected. Similarly, the Commission must reject the Nextel Communications, Inc. ("Nextel") proposal to prohibit withdrawing Applicants from subsequently acquiring returned licenses for a period of three years. Nextel's assertion that this condition is necessary to maintain auction integrity is not supported by the facts.

**I. The Commenters Unanimously Agree That Auction 35 Applicants Should Be Allowed To Voluntarily Withdraw Their License Applications**

The Commenters unanimously agree that the recent decline in the economy – and the telecommunications sector in particular – has severely curtailed the availability of capital to the Applicants, which in turn has limited the Applicants' ability to invest in their businesses. This situation is further aggravated by the \$16 billion in contingent liability associated with Auction No. 35, which adversely affects the availability and cost of capital and the Applicants' equity value, credit ratings, and their ability to meet current spectrum demands through secondary market transactions. Given these circumstances, *all* commenters agree that allowing the Applicants to withdraw their applications is in the public interest. In addition, virtually every commenter opposes for a variety of sound

reasons, the application of penalties to Applicants that elect to opt out. Most significantly, commenters point out that the circumstances that require an opt out plan did not result from any failure or inability on the Applicants' part to meet their auction obligations, but rather from the continuing inability of the Commission to deliver the Licenses. Further, there is good reason to believe that further litigation and regulatory proceedings may continue to make the Licenses unavailable for years to come.

## **II. Any Opt Out Plan Adopted By The Commission Should Be Administratively Simple And Capable Of Quick Implementation**

In crafting a regulatory mechanism to effect the opt out process, the Commission should devise an implementation plan that is simple and straightforward, and that grants relief as quickly as possible. The economic harm affecting the Applicants continues unabated, and no useful purpose will be served if the implementation plan for granting the Applicants relief becomes bogged down in complicated negotiations or regulatory machinations. Although T-Mobile does not object to the implementation of an opt out plan that provides some flexibility to the Applicants, the fundamental purpose of this proceeding is to grant expeditious relief to the Applicants so that they can focus their resources on their business plans without significant contingent liabilities incurred in a much healthier economy. Any implementation scheme that moves the Commission off this course of speedy resolution ultimately will serve neither the interests of the American public, the Applicants nor the Commission.

## **III. The Commission Should Reject Efforts To Condition Auction No. 35 Relief Upon Applying The Same Relief To Earlier Auctions**

The Commission should reject non-Applicant Eldorado's attempt to transform this proceeding into a reexamination of Auction No. 5. As an initial matter, the scope of this proceeding is specifically limited to Auction No. 35. If Eldorado wishes to obtain

relief from the Commission related to Auction No. 5, it should file a separate request to that effect. Moreover, there is no reasoned basis for applying relief measures under consideration for Auction No. 35 to any other auction. The complex regulatory history and legal proceedings that have prevented the Commission from delivering the Licenses are unique to Auction No. 35 and uniquely affect the Auction No. 35 Applicants.<sup>3</sup>

Moreover, the circumstances facing the winning bidders in Auction No. 35 and Auction No. 5 are completely distinguishable. Specifically, at the close of Auction No. 35, some twenty months ago, the Applicants were ready, willing and able to pay for the Licenses. The Commission, however, is legally prohibited from delivering the Licenses to the Applicants. During this period, the Applicants have suffered severe declines in their equity values, substantial losses in foregone interest on their deposits and foregone investment opportunities. The Applicants collectively retain some \$16 billion in contingent liability but have yet to obtain the benefit of using the Licenses. In contrast, in Auction No. 5, the Commission promptly made the licenses available following the close of that auction. Nonetheless, a number of winning bidders – including Eldorado – were unable or unwilling to make timely payment for reasons that are entirely dissimilar to the circumstances that have created the dilemma faced by the Auction No. 35 Applicants.

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<sup>3</sup> Eldorado made essentially the same arguments against awarding relief to the Applicants in its opposition to the January 4, 2002, joint request for a refund of down payments. See *Opposition of Eldorado Communications, LLC to Joint Request for Immediate Refund of Auction No. 35 Down Payments for NextWave Licenses* (Jan. 17, 2002). The Commission’s rationale for dismissing Eldorado’s opposition, albeit in the context of Eldorado’s legal standing to oppose the request, captures the irrelevancy of Eldorado’s comments in the instant proceeding: “Eldorado has failed to show a sufficient connection to [granting relief to Auction No. 35 Applicants to] establish that it would be injured thereby -- Eldorado’s forfeit of its down payment stands regardless of whether the Commission refunds down payments to Auction No. 35 winning bidders.” *Requests for Refunds of Down Payments Made In Auction No. 35*, 17 FCC Rcd 6283, 6283 n.5 (2002).

#### **IV. The Commission Should Reject Nextel Communications, Inc.'s Self-Interested Proposal To Penalize Withdrawing Applicants**

Nextel agrees with virtually every other commenter that the Applicants should be permitted to withdraw from Auction No. 35, but contends that withdrawing Applicants should be barred from acquiring any returned licenses at reauction or through secondary market transactions ostensibly in order to protect the integrity of the auction process.<sup>4</sup> Nextel's argument that auction integrity requires the application of penalties to withdrawing Applicants is unsupportable. Nextel's essential argument is that withdrawing Applicants would receive unjust enrichment by renouncing their "high" bids and then obtaining the same licenses at "lower" bids.<sup>5</sup> The Applicants, however, do not seek to return the Licenses in order to repurchase them later at prices that may or may not be lower, but rather seek immediate equitable relief from the continued economic hardship they have suffered as a direct result of the Commission's inability to deliver the Licenses. Ultimately, it is contrary to prudent public policy to penalize withdrawing spectrum auction bidders when the basis for that withdrawal is the Commission's continuing inability to deliver the Licenses within a reasonable period of time. Specifically, penalizing auction participants for good faith compliance with the Commission's auction rules disrupts the reasonable expectations of auction participants and clouds the auction process with uncertainty.

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<sup>4</sup> Comments of Nextel, at 4, 8-9. Nextel's position appears to be a self-interested attempt to decrease the level of competition it could face for the Licenses in a future auction. Specifically, if its position prevails, Nextel would be one of the only national carriers eligible to bid on the Licenses in the future.

<sup>5</sup> *Id.* at 9.

Nextel's proposal to extend a prohibition against acquiring returned licenses to "any [] party with a substantial equity interest in an Auction No. 35 bidder" is equally unsupportable.<sup>6</sup> There is no reasonable justification for penalizing withdrawing Applicants, much less noncontrolling investors that have fully complied with the Commission's competitive bidding rules and policies. Among other things, penalizing Auction No. 35 subordinate investors would limit the pool of subordinate investors in future auction applicants and, thus, limit the overall pool of participants in future auctions.<sup>7</sup>

Finally, Nextel's argument that barring withdrawing Applicants from acquiring the Licenses in the future would prevent a "windfall" to "the largest cellular providers" should be dismissed out of hand. First, neither Nextel nor any other party can forecast what prices the Licenses would bring in a future auction. Accordingly, Nextel's assertion that the Applicants would gain a financial windfall is specious. Winning bidders in any future auctions must pay what the market conditions dictate at the time. In any event, it is not in the public interest to arbitrarily exclude entities from an auction on the sole basis that they happen to be large cellular or PCS providers that chose to participate in a failed auction. Nextel's assertion that "these cellular operators [] benefited financially from

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<sup>6</sup> *Id.* at 11.

<sup>7</sup> *See, e.g.*, 47 U.S.C. § 309(j)(3)(B), which directs the Commission to ensure that its competitive bidding rules "ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."

numerous Commission-granted regulatory windfalls”<sup>8</sup> is particularly curious, given that Nextel is currently seeking free spectrum in another proceeding.<sup>9</sup>

**V. Returned Licenses Should Be Reauctioned Under The Same Terms And Conditions That Applied In Auction No. 35.**

T-Mobile supports the proposals of Cook Inlet/VS GSM V PCS and 3DL Wireless, LLC, to reauction any Licenses returned to the Commission under the same terms and conditions that applied in Auction No. 35. The public interest goals of ensuring small business participation in the auction process and the provision of telecommunications service generally will long survive the litigation that has stymied Auction No. 35. Further, designated entities, because of their relatively small size and organizational flexibility, often serve underserved areas and niche markets, providing valuable services to important segments of the American public. In short, designated entities will be no less deserving of an opportunity to acquire closed licenses in the future than they were when Auction No. 35 began.

**VI. Conclusion**

As the record in this proceeding decisively demonstrates, the unique circumstances surrounding Auction No. 35 require that the Commission permit the Applicants to withdraw their applications expeditiously without incurring any form of default penalty, including any restrictions on rebidding in any future auctions, and with

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<sup>8</sup> Comments of Nextel at 13.

<sup>9</sup> Nextel is seeking to swap a hodge podge of noncontiguous spectrum licenses it holds in the 700 MHz, 800 MHz and 900 MHz bands for 10 MHz of nationwide spectrum at 1.9 GHz. See *Improving Public Safety Communications in the 800 MHz Band*, 17 FCC Rcd 4873 (2002); FCC Public Notice, *Wireless Telecommunications Bureau Seeks Comment on “Consensus Plan” Filed in The 800 MHz Public Safety Interference Proceeding*, DA 02-2202 (Sept. 6, 2002).

the expeditious return, in full, of their down payment monies currently on deposit with the FCC. The comments of Eldorado and Nextel do not provide any justification for modifying this result and should be rejected. Finally, the Commission should continue its policy of encouraging the participation of designated entities in future auctions of these Licenses.

Respectfully submitted,

/s/ Bob Calaff

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